87-1998

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

ROGER FERNANDEZ,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I.

WAS PETITIONER ENTITLED TO AN "ENDS OF JUSTICE" CONTINUANCE WHEN, ON THE DAY OF TRIAL, THE GOVERNMENT SERVED PETITIONER'S ATTORNEY WITH A SUPERSEDING INDICTMENT WHICH ELIMINATED A COMPLETE DEFENSE TO THE CHARGES CONTAINED IN THE ORIGINAL INDICTMENT?

II.

WERE THE GOODS RECEIVED BY PETITIONER "IN INTERSTATE COMMERCE" EVEN THOUGH THE GOODS HAD PREVIOUSLY BEEN BORROWED BY THE FBI FROM AN INTERSTATE CARRIER FOR USE IN A REVERSE-STING OPERATION?

PARTIES BELOW

The parties to this proceeding are THE UNITED STATES OF AMERICA and ROGER FERNANDEZ, one of three Appellants in the Eleventh Circuit below and one of the five defendants in the United States District Court for the Southern District of Florida, all of whom were charged with conspiring to take goods from interstate commerce.

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No.

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ROGER FERNANDEZ,
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vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner ROGER FERNANDEZ requests the Court to issue a Writ of Certiorari to review the Opinion of the United States Court of Appeals for the Eleventh Circuit, entered on April 11, 1988, in Case No. 86-5945, affirming the Judgment of conviction by the United States District Court for the Southern District of Florida.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Eleventh Circuit is reproduced in the Appendix as Exhibit "1".

JURISDICTION

The Opinion of the Eleventh Circuit sought to be reviewed by Writ of Certiorari is dated April 11, 1988. The jurisdiction of this Court is invoked pursuant to Rules 17(a) and (c) of the Supreme Court Rules and 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1) The Due Process and Assistance of Counsel clauses of the Fifth and Sixth Amendments to the United States Constitution.

2) 18 U.S.C. Section 3161(h)(8) of the Speedy Trial Act.

3) 18 U.S.C. Section 371.

STATEMENT OF THE CASE[1]

Detective DeVarona of the City of Hialeah (Florida) Police Department suspected Petitioner Fernandez of being a "fence", so on July 18, 1986, DeVarona shed his uniform and approached Fernandez with an offer to sell Fernandez a truckload of "hot" television sets and electronic goods (Op. 2358). According to DeVarona, Fernandez expressed interest, so DeVarona went to the FBI, and the FBI borrowed (with the carrier's consent) a North American Van Lines truck containing electronic goods which had recently arrived in Miami from Tennessee, destined for delivery to purchasers in Miami area (Op. 2358, 2360, 2362). On July 28, 1986, DeVarona delivered the truck to Fernandez and his alleged co-conspirators who began to unload the truck and were arrested (Op. 2359).

The accused conspirators were indicted on August 7, 1986, and tried approximately thirty two days later, on September 9, 1986 (Op. 2359; R. 1, 6, 40). The indictment charged the defendants with conspiracy to steal goods moving in interstate commerce in violation of 18 U.S.C. Section 659. *Id.* The indictment alleged that the conspiracy had ended by June 30, 1986 (Op. 2359; R. 1). However, the indictment also alleged that the overt acts by the conspirators "in furtherance of" their conspiracy

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1. This petition challenges the Eleventh Circuit's legal conclusions and not its interpretation of the evidence. For that reason Petitioner has not requested the transmittal of the record to this Court; however, the Record is available for transmittal should this Court so order. The Appendix contains the Opinion of the Eleventh Circuit as well as the Docket Sheet and certain excerpts from the trial transcript. The Eleventh Circuit's Opinion will be cited as "Op." followed by the page number.

had occurred in July 1986, a month after the conspiracy had allegedly ended. *Id.* (As correctly noted by the Eleventh Circuit at p. 2358, the very *first* overt act by the defendants occurred on July 18, 1986, when Fernandez was approached by Detective DeVarona.) The district court denied Petitioner's motion to dismiss the indictment (R. 33).

On September 4, 1986, the government issued a superseding indictment (R. 26), which extended the ending dated of the alleged conspiracy through July 28, 1986, and also modified the offense charged by including an alleged conspiracy to "receive and possess" goods stolen from interstate commerce (Op. 2359, 2365). Petitioner's attorney first became aware of the superseding indictment when he was served with the new indictment on the morning trial began (when the jury was selected), and he then vigorously requested a continuance of at least "a day or two" to prepare a defense to the superseding indictment. *Id.* The trial court denied that request (R. 29), immediately rearraigned Fernandez, and proceeded wth jury selection and trial. Trial was therefore conducted thirty two days after the original indictment, and on the day Petitioner's attorney was served with the superseding indictment.

The district court at trial refused the request of Mr. Fernandez for a special instruction advising the jury that diversions and delays which were not in furtherance of the intended transportation could sever the interstate commerce nexus (T.T. Vol. II, 149, 165-171; Op. 2361-2362). Instead, the district court instructed the jury that the truck remained in interstate commerce until it arrived at its final delivery point and that "delays in route did not remove them from interstate commerce". (*Id.*).

Petitioner and two of the five defendants were convicted and appealed to the Eleventh Circuit. Petitioner argued, among other things, that: (1) when the truckload of goods was delivered to him on July 28, 1986, it was no longer "moving as" or "a part of" or "constituting" an interstate shipment (as charged by the superseding indictment) because the police had previously *removed* the truck and its contents from transit for a law enforcement "detour and frolic" which had no connection with the passage of the goods from their point of origin to their final destination, and was not in furtherance of the intended interstate transportation; and, (2) under 18 U.S.C. Section 3161(h)(8) at least a brief continuance should have been granted after Petitioner's attorney was served with a superseding indictment, on the very day of trial, which eliminated a complete defense created by the allegations in the original indictment that the defendants' overt acts in furtherance of the conspiracy had all occurred after the conspiracy had ended.

The Eleventh Circuit, though acknowledging that Petitioner's arguments were supported by case law from other circuits, rejected both arguments and affirmed the judgment of the district court.

REASONS FOR GRANTING THE WRIT

I

The Eleventh Circuit Unduly Trivialized the Effect of the Change in the Indictment on the Petitioner's Intended Defense When, on the Very Eve of Trial, the Superseding Indictment Eliminated a Complete Defense to the Original Indictment: That Change Was Highly Prejudicial to the Defendant and Deprived Him of Effective Assistance of Counsel, and the Trial Court's Refusal to Grant Even a Brief Continuance Under 18 U.S.C. Section 3161(h)(8) Was an Abuse of Discretion.

II

Criminal Statutes and Indictments Must Be Strictly Construed, and Petitioner Did Not Commit the Offense Charged Because the Truckload Delivered to Him Had Been Removed From Interstate Commerce and Diverted Into a Police "Detour and Frolic" Which Was Not in Furtherance of the Interstate Transportation and Had No Connection Whatever to the Passage of the Goods From Their Point of Origin to Their Final Destination.

1) *The Continuance Issue*: As acknowledged by the Eleventh Circuit, the original indictment alleged (1) a conspiracy which ended by June 30, 1986, and (2) overt acts "in furtherance of" that conspiracy which all occurred the following month (in July) (Op. 2359)[2].

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2. The Eleventh Circuit's opinion erroneously states at pp. 2359 and 2366 that the original indictment charged a conspiracy

(Continued on following page)

The Eleventh Circuit acknowledged that "the government was required to prove that an overt act occurred *during the conspiracy*" (Op. 2365). And the Eleventh Circuit also acknowledged that the superseding indictment, which the government served on Petitioner's counsel on the day of trial, extended the alleged conspiracy through the end of July, thus curing what would otherwise be a complete defense to the government's charges:

> "* * * [A]ppellant's initial defense relied on the fact that *no overt acts could be shown to have taken place during the course of the conspiracy in the time frame alleged in the indictment.*" Op. 2365. (Emphasis supplied.)

Notwithstanding the above, the Eleventh Circuit ruled that the district court did not abuse its discretion in refusing to grant even "a day or two" continuance in order for Petitioner's counsel to prepare a defense to the superseding indictment which eliminated a complete defense to the original indictment. The Eleventh Circuit offered no analysis to support its conclusion, merely stating that the original indictment was amended "only" to change the dates of the alleged conspiracy. The Eleventh Circuit's abuse of the adverb "only" is astonishing in view of the court's *acknowledgment* that all of the government's evidence related to acts by the defendants on July 18th and 28th, and therefore would have been

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Footnote continued—

both beginning and ending on June 30, 1986. In fact, the original indictment charged a conspiracy beginning on June 30, 1985, and ending on June 30, 1986. The original indictment therefore did not contain an obvious error by alleging a "one day" conspiracy (as implied by the Eleventh Circuit), but rather alleged a 12-month conspiracy which ended a month before Detective DeVarona first contacted the Petitioner.

inadmissible (under the original indictment) to prove the alleged conspiracy. Moreover, since the government had no evidence of any overt act by any of the defendants during the conspiracy period, Petitioner would have been entitled to a judgment of acquittal without offering any defense on the merits.

After the superseding indictment was served on Petitioner's attorney on the morning of jury selection, he obviously had no opportunity to prepare a defense on the merits. It is difficult to envision a more prejudicial situation than for a defendant to be charged by an indictment so flawed as to compel the exclusion of all the government's testimony and evidence, and for that flaw to then be corrected on the very day of trial. Even in *civil* litigation, such a material change in the plaintiff's claim would require a continuance to prevent "sandbagging" of the defendant: No state or federal appellate court would tolerate a trial judge's refusal to grant a civil defendant a continuance after allowing a civil plaintiff to amend his complaint *the morning of trial.* It would seem axiomatic that a defendant whom the government seeks to imprison would be entitled to at least the same procedural safeguards which are always afforded to civil debtors and tortfeasers.

The situation faced by Petitioner on September 8, 1986 was therefore very different from the situation considered by this Court in *United States v. Rojas-Contreras*, 474 U.S. 231, 106 S.Ct. 555, 88 L.Ed.2d 537 (1985). In that case the Court held that there is no *per se* requirement, under Section 3161(c)(2) of the Speedy Trial Act, that an additional thirty days be granted after a superseding indictment is filed, but the Court simultaneously *emphasized* the availability, under Section 3161(h)(8),

of an "ends of justice" continuance in "any case in which the government seeks a superseding indictment which operates to prejudice a defendant". 106 S.Ct. at 558. As Justices Blackman and Brennan stated in their concurring opinion, in the event of a material change in the indictment, the defendant is *entitled* to additional preparation time because:

> "The constitutional right to assistance of counsel is rendered meaningless if a defendant is forced to trial in the absence of adequate time to prepare. To avoid prejudicing a defendant, a continuance should be granted whenever there is *a meaningful possibility that a superseding indictment will require an alteration or adjustment in the planned defense.* Trial courts should bear in mind that counsel may require time fully to analyze the impact of the superseding indictment, and to explore any options it presents *or precludes.*" *Id.* at p. 560. (Emphasis supplied.)

The District Court and the Eleventh Circuit ignored those cautionary words. In this case there was more than merely a "meaningful possibility" that the superseding indictment required an overhaul of Petitioner's planned defense. Petitioner submits that the superseding indictment in this case, served on Appellant's counsel on the very morning of trial (itself only thirty-two days after the original indictment), created exactly the type of prejudicial situation which motivated this Court in *Rojas-Contreras* to remind the lower courts of the availability of "ends of justice" continuances pursuant to Section 3161(h)(8). See also *United States v. Reynolds*, 781 F.2d 135, 137 (8th Cir. 1986), where the court observed that trial judges "should grant a motion for con-

tinuance if to do otherwise would prejudice the defendant's ability to prepare for trial". The facts in this case are precisely those which were addressed in *United States v. Harris*, 742 F.2d 1452, 1455 (9th Cir. 1984), where the Ninth Circuit held that a trial judge ought to have granted the defendant a continuance when the government filed a superseding indictment, immediately prior to trial, which eliminated a possible defense. Although this Court in *Rojas-Contreras* held that a full 30-day continuance is not required under Section 3161 (c)(2), the underlying holding in *Harris*—that a defendant is entitled to additional time when the government makes a substantial change in the charges against him —was expressly ratified by this Court in *Rojas-Contreras*.

It is exceedingly difficult to reconcile the Eleventh Circuit's decision (holding that Petitioner was not entitled even to "a day or two" continuance to prepare a defense to an eleventh-hour superseding indictment which eliminated a complete defense), with the Sixth and Tenth Circuit decisions in *United States v. Meyer*, 803 F.2d 246 (6th Cir. 1986), cert.den. 107 S.Ct. 1580, and *United States v. Guerrero*, 667 F.2d 862 (10th Cir. 1981), cert.den. 102 S.Ct. 2044. In *Meyer*, the Circuit Court approved an "ends of justice" continuance requested by the government, over the defendant's objection, merely so a trial would not delay the *honeymoon plans of a government agent*. The Sixth Circuit remarked that it would be "unreasonable" to delay the agent's honeymoon. In *Guerrero* the Circuit Court approved a *45-day* "ends of justice" continuance requested by the government, over the defendant's objection, merely because a federal official who was a witness in the case wanted to delay the trial so it would not disrupt his election campaign.

See also *United States v. Fielding*, 645 F.2d 719 (9th Cir. 1981) and *United States v. Bryant*, 726 F.2d 510 (9th Cir. 1984), granting liberal continuances for the convenience of the government.

If it is "unreasonable" not to grant lengthy continuances to the government, over the defendant's objection, merely so government officials will not have to postpone their honeymoon trips or interrupt their election campaigns, then one would think that citizens charged with crimes would be entitled to *a day or two* to re-evaluate their defense in view of eleventh-hour superseding charges first revealed to them during jury selection. The Court is respectfully urged to accept this case in order to insure that citizens accused of crime are afforded sufficient time to prepare their defense, just as government officials are permitted to toll speedy trial requirements even for relatively trivial reasons.

2) *The Interstate Commerce Issue.* 18 U.S.C. Section 659 makes it a crime to receive goods which have been stolen from interstate commerce. Thus the superseding indictment accused Fernandez of conspiring to receive stolen goods which were "moving as and were a part of and constituted an interstate and foreign shipment of freight."

In *United States v. Gollin*, 166 F.2d 123 (3d Cir. 1947), the Court observed that an interstate shipment includes temporary interruptions and diversions *"in furtherance of the intended transportation* * * * on its way to the ultimate customer" (emphasis added). In *United States v. Sherman*, 171 F.2d 619, 622 (2d Cir. 1948), the Court observed that a shipment remains in interstate commerce so long as it is in "the custody of someone

who without more than inevitable pauses was to pass them along".

It was undisputed that the use of the truck by the police in this case, to "reverse-sting" the defendants, was in no sense "in furtherance" of the transportation of the goods to the ultimate user. When the truck was in the hands of Detective DeVarona and the FBI, with the shipper's consent, it was no longer *en route* to its destination but had been diverted to a law enforcement detour and frolic having *no connection whatever* with the truck's interstate transportation.

The government's own witnesses acknowledged that the FBI's use of the truck had no connection whatever with the passage of the truck in interstate commerce:

"Q. [I]n order for the truck to arrive at its destination, it was not necessary to loan it to the FBI?

A. No, it was not.

Q. While this truck was in the FBI's possession, it was not in the process of transporting goods, it was in the process of a sting operation; correct?

A. I guess so, yes."

* * *

"Q. Were any of the stops that this shipment was to make in Opa-locka?

A. Not according to this document [the bill of lading], no.

Q. Were any of the stops that this shipment was to make in Hialeah?

A. Not according to this document.

Q. Were any of the stops that this shipment was to make the FBI.

A. Not according to this document.

Q. In order for this shipment to reach its ultimate destination, was it necessary that it goes through the hands of the FBI?

A. Not according to this document.

Q. Have you ever had shipment where it was necessary that the shipment go through the hands of the FBI in order to reach its final destination?

A. Not to my knowledge, no." (R. 72, 73; Trial Transcript Vol. I, pp. 52-53; Vol. II, pp. 122-123).

It is axiomatic that criminal laws and indictments are to be strictly construed. Yet in this case, as acknowledged by the Eleventh Circuit, the police obtained a carrier's consent to borrow a truck for what can only be termed a police detour having no connection whatever to the process of transporting goods from Tennessee to their final destination. See *Barfield v. United States*, 229 F.2d 936, 939 (5th Cir. 1956), defining interstate transportation to include a journey from its origin to its ultimate destination, and including "transitory diversions" which are *"a part of* and *would further the main journey"*. See also, *Hughes Bros. Co. v. Minnesota*, 272 U.S. 469, 475-476 (1926) (defining interstate commerce to include incidental delays and interruptions in the mode of transportation so long as they are "in furtherance of the intended transportation); *United States v. Fox*, 166 F.2d 237, 238 (2d Cir. 1942) (interstate commerce encompasses goods in "the possession of any of those who are to forward them upon an interstate journey").

The Eleventh Circuit acknowledged in its opinion that the government is required to prove that the goods delivered to Fernandez were a part of interstate commerce within the meaning of Section 659 (Op. 2361). Even the Eleventh Circuit recognized that there is legal authority from other circuits that the government's use of the goods for a reverse sting operation may have "removed them from interstate commerce by interrupting the natural passage of the goods from Tennessee to their delivery point in Miami" (Op. 2363). See, e.g., *United States v. Tobin*, 576 F.2d 687, 692 (5th Cir. 1978) ("so long as [the shipment's] movement within the destination state can be considered *a continuation of the movement* that began out of state * * *"); *United States v. Sherman, supra; Barfield v. United States, supra*, 939.

The Eleventh Circuit apparently rejected Petitioner's argument on the theory that it was sufficient that the truck had been in interstate commerce *prior to its delivery to the FBI*. That conclusion ignores the fact that the shipment was obviously not in interstate commerce when Fernandez received it, and the latter date obviously must control when a party is accused of taking or receiving goods in interstate commerce. See *United States v. Garber*, 626 F.2d 1144, 1148 (3d Cir. 1980) and cases cited therein. The Eleventh Circuit's conclusion that the goods somehow retained a "constitution" (Op. at 2363) as an interstate shipment, notwithstanding that they had been removed from transit for a reverse-sting operation, simply ignores the fact that the goods in the FBI's custody were no longer continuing their movement in interstate commerce and that the FBI's custody of the goods in no sense furthered their transportation toward their ultimate destination. The FBI might just as well

have delivered to Petitioner goods which the FBI had acquired years before from interstate commerce but which had since been stored in a government warehouse or office in Miami[3]. While interstate commerce certainly includes and encompasses all normal delays, diversions and disruptions of transit, the conveyance of a truck to the police for law enforcement purposes is not an ordinary delay or interruption of the shipment process, but rather a diversion and detour having no connection whatever with the transportation of the goods, and is not even remotely "in furtherance of" their journey. Therefore the Eleventh Circuit was wrong to have concluded that the "constitution of the goods as an interstate shipment" was unaffected by the FBI's use of the goods in a reverse-sting operation.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, and either reverse Petitioner's conviction in the trial court (if the Court agrees with Point II of

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3. The logical implication of the Eleventh Circuit's view that the goods retained some residual "constitution" as interstate goods even while in the government's possession, because they were moving in interstate commerce *before* the government took possession, is that even if the goods had been government property (or government evidence from a prior prosecution under Section 659), the goods could be used again and again in "reverse sting" investigations. The purpose of Section 659 was to punish interference with goods "moving as or which are a part or which constituted interstate * * * shipment", not to punish the receipt of goods lawfully *removed* from interstate commerce by the police.

this brief) or remand for retrial (if the Court agrees with Point I of this brief).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by mail to Leon B. Keilner, United States Attorney, 155 South Miami Avenue, Miami, FL 33130-1693, att: Jeffrey B. Crockett, AUSA; and to Solicitor General, Department of Justice, Washington, D.C. 20530 this 3rd day of June, 1988.

THOMAS M. PFLAUM, ESQ.

APPENDIX

UNITED STATES of America,
Plaintiff-Appellee,

v.

Angel PETIT, Roger Fernandez, Francisco Pasqual,
Defendant-Appellants.

No. 86-5945.

United States Court of Appeals
Eleventh Circuit.

April 11, 1988.

Defendants were convicted in the United States District Court for the Southern District of Florida, No. 86-643 CR-JWK, James W. Kehoe, J., of conspiracy to receive and possess goods stolen from interstate commerce and defendants appealed. The Court of Appeals, Kravitch, Circuit Judge, held that: (1) defendants could be convicted of conspiring to receive stolen goods notwithstanding fact that goods were not stolen but had been borrowed by Government for use in sting operation; (2) FBI's use of goods in sting operation did not remove goods from interstate commerce; and (3) erroneous admission of nontestifying defendant's confession implicating defendant was harmless error.

Affirmed.

1. Conspiracy (Key) 24, 27, 28(2)

While charge that crime has been attempted or committed focuses on defendant's conduct leading toward commission of crime, charge of conspiracy is concerned more with intent of alleged perpetrators, so that crime of conspiracy is complete once conspirators, having formed intent to commit crime, take any step in preparation, and it is not necessary that substantive crime itself be committed.

2. Conspiracy (Key) 47(11)

Evidence that alleged conspirators believed electronic equipment to have been stolen and that conspirators conspired to receive such property was sufficient to support conviction of defendants for conspiring to receive stolen property notwithstanding fact that defendants could not have been convicted of substantive offense of receiving stolen property as electronic equipment had not been stolen, but rather had been borrowed by Government with carrier's permission for use in sting operation. 18 U.S.C.A. § 371.

3. Conspiracy (Key) 28(3)

In order to sustain conviction of conspiracy to receive goods stolen from interstate commerce it is unnecessary that Government prove that defendants had knowledge that goods were moving in interstate commerce, but Government is required to prove that goods were part of interstate commerce within meaning of statute. 18 U.S.C.A. § 659.

4. Conspiracy (Key) 28(3)

Electronic equipment used in sting operation remained in interstate commerce from the time it was shipped until

it was delivered to purchaser, and fact that goods arrived in city in which purchaser was located before goods were used in sting operation did not serve to take shipment out of interstate commerce for purpose of allowing conviction for conspiracy to receive stolen goods. 18 U.S.C.A. § 659.

5. Conspiracy (Key) 28(3)

So long as goods are en route between shipper and customer it makes no difference whether illegal activity takes place in city of origin or city of destination for purpose of satisfying interstate commerce requirement for conviction of conspiracy to receive stolen goods. 18 U.S.C.A. § 659.

6. Receiving Stolen Goods (Key) 2

FBI's use of electronic equipment in sting operation did not remove goods from interstate commerce for purpose of allowing conviction for receiving stolen property. 18 U.S.C.A. § 659.

7. Criminal Law (Key) 589(1)

District court did not abuse its discretion in refusing to grant continuance when Government returned superseding indictment two working days before trial was scheduled on charges of conspiracy to receive and possess stolen goods which constituted interstate shipment of freight; superseding indictment amended original indictment in only two respects, by adding as additional purpose of conspiracy that defendants conspired to receive and possess stolen property, rather than merely to take property unlawfully and changing ending date of conspiracy to date of defendant's arrest.

8. Criminal Law (Key) 528, 662.10

Nontestifying codefendant's statement that he called "friend" who gave permission for goods to be stored at his warehouse, when considered with other evidence, could reasonably be understood only as referring to defendant, so that although codefendant's confession did not directly implicate defendant in conspiracy, it sufficiently inculpated him so as not to fall under clear exception to *Bruton*, and thus, admission of incriminating confession violated defendant's confrontation clause rights. U.S.C.A. Const. Amend. 6.

9. Criminal Law (Key) 1169.7

Admission of confession in violation of *Bruton* is subject to harmless error rule.

10. Criminal Law (Key) 1169.7

Erroneous admission of nontestifying codefendant's statement regarding codefendant's participation in conspiracy to receive stolen goods, although a *Bruton* violation, was harmless beyond a reasonable doubt; although totality of evidence against defendant was less than against other codefendants, given defendant's post-arrest admissions, statements and behavior during unloading of truck as testified to by officer and officer's properly admitted testimony corborating fact that codefendant called person at small warehouse to arrange for storage of goods, *Bruton* violation was harmless.

11. Criminal Law (Key) 1159.2(1)

Challenges of insufficient evidence are reviewed under less stringent standard than that used in harmless error analyses.

12. Conspiracy (Key) 47(11)

Evidence was sufficient to support conviction of defendant for conspiracy to receive and possess goods stolen from interstate commerce; evidence established that defendant knew essentials of conspiracy and participated in conspiracy.

Appeals from the United States District Court for the Southern District of Florida.

Before KRAVITCH and CLARK, Circuit Judges, and ESCHBACH*, Senior Circuit Judge.

KRAVITCH, Circuit Judge:

In this sting operation, the government obtained the permission of a carrier of electronic equipment to use the equipment while it was en route to its purchaser. As a result of their efforts to purchase the equipment, Roger Fernandez, Francisco Pasqual, and Angel Petit were convicted of conspiracy to possess stolen goods, in violation of 18 U.S.C. § 371.[1] Five issues are presented on their appeal: (1) whether appellants were properly convicted of conspiring to receive and possess goods "stolen" from interstate commerce; (2) whether the goods were in "interstate commerce" at the time of the sting operation; (3) whether the trial court should have granted a continuance after the superseding indictment was issued; (4) whether the admission of Pasqual's post-arrest statements violated Petit's right to cross-examine witnesses; and (5) whether the evidence was sufficient to sustain Petit's conviction.

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*Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

1. The underlying offense of the conspiracy is prescribed by 18 U.S.C. § 659.

I.

Carlos Devarone, a detective with the Hialeah, Florida Police Department, set up several sting operations to target fences of stolen goods. A confidential informant had given Devarone the names of possible fences, including that of appellant Roger Fernandez. Devarone, acting undercover, and accompanied by the informant, met with Fernandez on July 18, 1986. Devarone testified that Fernandez initially was interested in buying the two television sets that Devarone had brought to the meeting, but was advised that they were for Devarone's personal use. The informant told Fernandez, however, that he and Devarone had a tractor-trailer full of similar electronic equipment to sell. Devarone testified that he told Fernandez that the property was stolen and that it was coming from "up north." According to Devarone, Fernandez agreed to purchase the stolen equipment for $94,000, although its actual value would be much higher, and the parties set a delivery date for the following week.

Ten days later, Devarone, wearing a concealed tape recorder, and the informant arrived at Fernandez's place of business, accompanied by an undercover Metro-Dade police officer driving a North American Van Lines tractor-trailer load of Magnavox and Sylvania television sets, video cassette recorders, stereo radio cassette recorders, and clock radios. The electronic equipment, which had been shipped from Tennessee, had not yet been delivered to its Miami purchasers,[2] and was used in the sting operation with the consent of its carrier. Fernandez was

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2. Triple A Cooper Transportation Company in Medley (in the metropolitan Miami area) and the Doral Hotel and Country Club in western Miami.

present when the loaded truck arrived, as were codefendants Emerio Delgado and Jaime Villeda, two of Fernandez's employees. Appellant Pasqual arrived shortly thereafter. After some confusion about where the equipment was to be unloaded and stored, Pasqual called appellant Petit and obtained permission to use "A-1 Auto Repairs," located in a small warehouse. When the tractor-trailer arrived there, the warehouse had been almost entirely cleared of cars. At Pasqual's request, Petit, a mechanic at the warehouse, moved the two remaining cars outside. Pasqual also asked the other defendants to look around the area of the warehouse to determine whether any police officers were nearby. Because the driver was having a difficult time parking the truck, several neighbors came outside to watch, which made Petit very nervous. According to Devarone, Petit urged the other defendants to hurry and finish unloading the truck because he was afraid that the neighbors' suspicions would be aroused by the unloading of television sets into a warehouse where automobiles were supposedly being repaired. Other proffered explanations for Petit's nervousness, however, include his fear that the truck would hit some of his customer's cars or that his boss would return to find him neglecting his job.

Because he had not yet been shown any money for the goods, Devarone ordered the unloading to stop, not to be resumed until he saw that the defendants actually had the money to pay for the merchandise. When the money failed to materialize, the police and Federal Bureau of Investigation (FBI) agents moved in and arrested all of the defendants, including appellants.

Appellants initially were charged with conspiring to steal goods valued in excess of $100.00 which were moving

in interstate commerce, in violation of 18 U.S.C. § 659. Although the first indictment mistakenly charged that the alleged conspiracy both began and concluded on June 30, 1986, it correctly provided that the overt acts taken in furtherance of the conspiracy took place between July 1 and July 28, 1986. Several days before trial, the government issued a superseding indictment which extended the ending date of the conspiracy to July 28, 1986, the date of the defendants' arrest. The superseding indictment also modified the purpose of the conspiracy, alleging that the defendants conspired to receive and possess stolen goods which constituted an interstate shipment of freight.

Following a jury trial, appellants Roger Fernandez, Angel Petit, and Francisco Pasqual were convicted. Defendants Emerio Delgado and Jaime Lopez Villeda were acquitted.

II.

A. *Were appellants properly convicted of conspiring to receive stolen goods?*

Appellants were convicted under 18 U.S.C. § 371[4] of conspiring to commit a crime prohibited by 18 U.S.C. § 659.[5] On appeal they argue that their convictions are

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4. This statute provides in part:

> If two or more persons conspire . . . to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

5. This statute provides in pertinent part:

> Whoever embezzles, steals, or unlawfully takes by any fraudulent device, scheme, or game, from any railroad car,

(Continued on following page)

invalid because a conviction under section 659 requires the government to prove that the defendants bought, received, or possessed goods which were actually stolen.[6] They point out that the electronic equipment in this case had not been stolen but rather had been borrowed by the government with the carrier's permission. Accordingly, they contend that because they could not have been convicted of the substantive offense of possessing stolen merchandise, they should not have been convicted of conspiring to commit the substantive offense.

[1] Although some courts have recognized an impossibility defense with regard to attempted crimes, *People v. Jaffe*, 185 N.Y. 497, 78 N.E. 169 (1906) (no conviction allowed for attempt to receive stolen property when the property had been restored to its owners and was used with their permission at the time it was offered to the defendant), "[c]ourts have generally taken a broader view of the purposes of the law of conspiracy." W. LaFave & A. Scott, *Criminal Law* 475 (1972). As one commentary has explained:

> The antisocial potentialities of a conspiracy, unlike those of an attempt, are not confined to the objects

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Footnote continued—

> bus, vehicle, steamboat, vessel, or aircraft operated by any common carrier moving in interstate or foreign commerce or from any passenger thereon any money, baggage, goods, or chattels, knowing the same to have been embezzled or stolen—
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> Shall in each case be fined no more than $5,000 or imprisoned not more than ten years, or both. . . .

6. They cite *United States v. Monasterski*, 567 F.2d 677, 684 (6th Cir.1977) ("one cannot be convicted of receiving stolen goods when actual physical possession of the stolen goods has been recovered by their owner or his agent before delivery to the intended receiver").

> specifically contemplated at any given time. The existence of a grouping for criminal purposes provides a continuing focal point for further crimes either related or unrelated to those immediately envisaged. Moreover, the uneasiness produced by the consciousness that such groupings exist is in itself an important antisocial effect. Consequently, the state has an interest in stamping out conspiracy above and beyond its interest in preventing the commission of any specific substantive offense.

Developments in the Law—Criminal Consiracy, 72 Harv. L.Rev. 920, 924-25 (1959). While a charge that a crime has been attempted or committed focuses on the defendant's *conduct* leading toward the commission of the crime, a charge of conspiracy is concerned more with the *intent* of the alleged perpetrators. "The crime of conspiracy is complete once the conspirators, having formed the intent to commit a crime, take any step in preparation. . . ." *State v. Moretti*, 52 N.J. 182, 187, 244 A.2d 499, 502, *cert. denied*, 393 U.S. 952, 89 S.Ct. 376, 21 L.Ed.2d 363 (1968), and it is unnecessary that the substantive crime itself be committed. *United States v. Rose*, 590 F.2d 232 (7th Cir.1978), *cert. denied*, 442 U.S. 929, 99 S.Ct. 2859, 61 L.Ed.2d 297 (1979).

[2] Accordingly, this circuit has held that for a conspiracy conviction under section 371 to stand, "the government did not have to prove that the [items] were *actually* stolen; it was enough for the government to show that the conspirators conspired [to receive goods] which they *believed* to be stolen." *United States v. Sarro*, 742 F.2d 1286, 1297 (11th Cir.1984) (emphasis in original). *See also United States v. Bobo*, 586 F.2d 355, 371 (5th Cir.1978) (to affirm conspiracy conviction, "it need not be shown

that the substance [purchased by the defendant] was in fact heroin as long as he thought he was buying a controlled substance and believed he was furthering the ends of the conspiracy"), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1546, 59 L.Ed.2d 795 (1979);[7] *United States v. Thompson*, 493 F.2d 305 (9th Cir.) (for conviction of conspiracy to smuggle marijuana to stand, it was unnecessary that the government prove that the substance involved was actually marijuana), *cert. denied*, 419 U.S. 834, 95 S.Ct. 60, 42 L.Ed. 2d 60 (1974); *United States v. Rose*, 590 F.2d at 235 (rejecting defendants' argument that conspiracy to transport stolen goods in interstate commerce could not exist unless the goods had actually been stolen).[8] In this case, the government provided ample evidence from which the jury could have concluded, beyond a reasonable doubt, that the alleged conspirators believed the goods to have been stolen: Devarone's testimony that he told Fernandez that the goods were stolen, the taped conversations between the government agents and several of the defendants, the agreed-upon price which was far below the value of the merchandise, the slang expressions for stolen goods used by some defendants, and the defendants' actions in scouting around the warehouse looking for police. As such, although appellants could not have been convicted of the substantive offense of receiving stolen property, their convictions for conspiring to receive stolen property cannot be reversed on this ground.

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7. In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981) (in banc), this court adopted as binding precedent all of the decisions of the former Fifth Circuit decided prior to October 1, 1981.

8. *But see United States v. Binetti*, 552 F.2d 1141 (5th Cir.1977) (where distributed substance was a harmless, non-controlled substance rather than cocaine, appellant's conviction of conspiring to possess and distribute cocaine could not stand; unclear from opinion whether appellant *believed* the substance to be cocaine or knew that it was harmless).

B. *Were the goods in interstate commerce at the time of the sting operation?*

[3] Section 659 of Title 18 of the United States Code provides sanctions against any person who:

> [S]teals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any . . . motortruck, or other vehicle . . . with intent to convert to his own use *any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight, express, or other property;* or
>
> Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen. . . .

(Emphasis added). In order to sustain a conviction of conspiracy to receive stolen goods in violation of this section, it is unnecessary that the government prove that the defendants had knowledge that the goods were moving in interstate commerce. *United States v. Feola*, 420 U.S. 671, 95 S.Ct. 1255, 43 L.Ed.2d 541 (1975); *United States v. Viruet*, 539 F.2d 295, 297 (2d Cir.1976); *Cf. United States v. Beil*, 577 F.2d 1313 (5th Cir.1978) (knowledge that property has moved or will move in interstate commerce not required to sustain conviction of conspiracy to violate 18 U.S.C. §§ 2312, 2313), *cert. denied*, 440 U.S. 946, 99 S.Ct. 1422, 59 L.Ed.2d 634 (1979). The government is required to prove, however, that the goods were a part of interstate commerce within the meaning of section 659. In this case, the district court instructed the jury that "a shipment from one state to another remains an interstate shipment in the destination state until it arrives at its final destination and is there delivered." He also charged

the jury that so long as the goods had not reached their final destination, delays en route did not remove them from interstate commerce.

[4] Appellants argue that the goods in this case were not in interstate commerce, and accordingly that their convictions are invalid for lack of federal jurisdiction. First, they contend that Miami itself, rather than the eventual delivery point within Miami, was the final destination of the goods.[9] Accordingly, because the goods had arrived in Miami before their use in the sting operation, appellants assert that any interstate travel by the shipment had concluded before the goods were borrowed by the government.

The test for determining whether a shipment of goods is in interstate commerce is

> a practical one, depending upon the relationship between the consignee, consignor, and carrier, the indicia of interstate commerce at the time the theft occurs, and the preservation of the congressional intent.

United States v. Gates, 528 F.2d 1045, 1047 (5th Cir.), *cert. denied*, 429 U.S. 839, 97 S.Ct. 110, 50 L.Ed.2d 106 (1976) (quoting *United States v. Cousins*, 427 F.2d 382, 385 (9th Cir.1970)). Federal courts have held, "given the all-inclusive sweep of its terminology, that Section 659 is designed by the Congress to promote the flow of goods in interstate commerce . . . and that the carrying out of this purpose is not to be hampered by technical legal conceptions." *United States v. Astolas*, 487 F.2d

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9. Although appellant Petit does not make this argument in his brief, he has adopted by reference all parts of the brief of appellant Fernandez which are pertinent to his case.

275, 279 (2d Cir.1973), *cert. denied*, 416 U.S. 955, 94 S.Ct. 1968, 40 L.Ed.2d 305 (1974). *See also United States v. Garber*, 626 F.2d 1144, 1147 (3d Cir.1980), *cert. denied*, 449 U.S. 1079, 101 S.Ct. 860, 66 L.Ed.2d 802 (1981); *United States v. Waronek*, 582 F.2d 1158 (7th Cir.1978). The appellants concede that the electronic equipment was a part of interstate commerce at least until it reached Miami. We agree with the government, however, that "an interstate shipment of goods 'does not lose its characteristic as such until it arrives at its final destination *and is there delivered.*'" *United States v. Garber*, 626 F.2d at 1147-48 (3d Cir.1980) (quoting *United States v. Yoppolo*, 435 F.2d 625, 626 (6th Cir.1970)) (emphasis added).[10] In *Garber*, a shipload of copper cathodes en route to Bridgeport, Connecticut, was discharged instead at Philadelphia because of labor problems at the Bridgeport terminal. The shipper found the freight costs of sending the cathodes by land from Philadelphia to Bridgeport prohibitive, and thus it was forced to seek other buyers for the shipment. In the interim, the cathodes remained on a pier in Philadelphia, and it was from the pier that the defendants stole a number of the cathodes approximately a month after they had been unloaded. The court explicitly rejected the defendants' argument that the fact that the shipper did not have a specific purchaser in mind at the time of the theft removed the goods from commerce. Rather, it stated that the goods did not leave commerce until their *final* delivery was effected, quoting from *United States v. Gates*, 528 F.2d 1045 (5th Cir.), *cert. denied*, 429 U.S. 839, 97 S.Ct. 110, 50 L.Ed.2d 106 (1976). In *Gates*, on analogous facts, the

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10. *See also Levi v. United States*, 71 F.2d 353, 354 (5th Cir.1934) ("An article once placed in interstate commerce continues therein at least until it reaches the point of destination.").

former Fifth Circuit found that the consignee's refusal to accept delivery of goods did not remove the goods from interstate commerce. Because alternative arrangements would necessarily have been made to dispose of the shipment, the shipment remained in interstate commerce. Accordingly, the theft of the goods after the consignee had refused them was within federal jurisdiction.

[5] Appellants could not have prevailed on this argument had the sting operation taken place somewhere along the route between Jefferson City, Tennessee, and Florida, rather than in Miami itself. It logically follows that so long as the goods are en route between the shipper and the customer it makes no difference whether the illegal activity takes place in the city of origin or city of destination. *See United States v. Astolas*, 487 F.2d 275 (2d Cir.1973) (where goods had been loaded, sealed, and routed, and were merely awaiting the arrival of the shipper's own drivers to drive the trailers to their interstate destinations, goods had entered interstate commerce), *cert. denied*, 416 U.S. 955, 94 S.Ct. 1968, 40 L.Ed. 2d 305 (1974). Therefore, because the goods remained in commerce from the time they were shipped until they were delivered to their purchaser, appellants' contention that the goods were no longer in interstate commerce once they arrived in Miami is simply erroneous.

[6] Appellants' second argument is that the FBI's use of the goods in the sting operation removed them from interstate commerce by interrupting the natural passage of the goods from Tennessee to their delivery points in Miami. There is some authority to support appellants' position, *e.g.*, *United States v. Tobin*, 576 F.2d 687, 692 (5th Cir.) ("So long as [the shipment's] move-

ment within the destination state can be considered a continuation of the movement that began out of state the [statutory prerequisite] is satisfied"), *cert. denied*, 439 U.S. 1051, 99 S.Ct. 731, 58 L.Ed.2d 711 (1978);[11] *United States v. Sherman*, 171 F.2d 619, 622 (2d Cir.1948) (test for determining whether goods are in interstate commerce is if they have left the possession of the shipper and have come into the custody of someone who without more than inevitable pauses passes them along), *cert. denied*, 337 U.S. 931, 69 S.Ct. 1484, 93 L.Ed. 1738 (1949).[12] However, "[i]n order to constitute an offense under the statute, it is not necessary that the goods be actually moving in interstate commerce at the time of [illegal receipt]." *United States v. Williams*, 559 F.2d 1243, 1247 (4th Cir.1977). As explained in *United States v. Astolas*, 487 F.2d at 279, section 659 provides three means by which the interstate commerce requirement may be met: "the goods can be (1) moving as an interstate shipment, (2) part of an interstate shipment, or (3) constituting an interstate shipment." Here, the fact that the electronic equipment was used in a sting operation did not change its constitution as an interstate shipment of goods.

The district court's instruction to the jury on this issue was derived from *United States v. Garber*, 626 F.2d

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11. The defendants in *Tobin* were convicted of violations of 18 U.S.C. §§ 2314 and 2315 (1976). Prior to its amendment in 1986, § 2315 referred to interstate commerce with language virtually identical to that contained in 18 U.S.C. § 659.

12. *See also Barfield v. United States*, 229 F.2d 936, 939 (5th Cir.1956) ("Once the intended journey West got underway, any driving, no matter how circuitous or frequent the transitory diversions were, so long as it was a part of and would further the main journey, would amount to [interstate] transportation under [18 U.S.C.A. § 2312]").

at 1148, where the court stated, "Delays enroute do not deprive shipments of continued characterization as interstate . . . so long as the goods have not yet reached their destination . . . and the shipper or carrier intends to resume the journey." Appellants argue that the FBI's use of the goods cannot be viewed as an inadvertent pause or detour in the natural interstate transit process. Rather they contend that the actions of the FBI and the local police in borrowing the truckload of goods was merely an attempt to manufacture federal jurisdiction. Appellant Petit cites *United States v. Archer*, 486 F.2d 670 (2d Cir.1973), a case involving the Travel Act, 18 U.S.C. § 1952. In *Archer*, a federal agent investigating New York City corruption placed several phone calls to Klein, one of the defendants, from Newark, New Jersey, for the sole purpose of having Klein speak in an interstate telephone call in order to obtain federal jurisdiction. Although Klein was not in, the agent left messages for him to return the calls, which Klein did. In reversing the defendants' convictions, the court stated:

> when Congress responded to the Attorney General's request to lend the aid of federal law enforcement to local officials in the prosecution of certain crimes, primarily of local concern, where the participants were engaging in interstate activity, it did not mean to include cases where the federal officers themselves supplied the interstate element and acted to ensure that an interstate element would be present. Manufactured federal jurisdiction is even more offensive in criminal than in civil proceedings.

The Seventh Circuit, in *United States v. Podolsky*, 798 F.2d 177 (7th Cir.1986) squarely confronted the issue of

manufactured jurisdiction. In *Podolsky*, the appellant had been hired by a paid informant for the federal Bureau of Alcohol, Tobacco and Firearms to burn down a vacant building located at 2436 West Division Street in Chicago. Because the Bureau became concerned that there might be no federal jurisdiction over number 2436, the informant asked Podolsky to burn down number 2438 as well. After demanding and receiving assurances that no one would be inside number 2438, Podolsky and an accomplice went there prepared to burn it, but upon arrival, saw a light in one of the windows. Because they were afraid that someone might be inside, they went instead to burn number 2436, where they were arrested by federal agents. Podolsky was charged with conspiracy to burn number 2438, as opposed to 2436, because of the Bureau's jurisdictional concerns. Following his conviction, Podolsky, citing *Archer*, argued on appeal that his conviction should be set aside because the government had manufactured jurisdiction by steering him to number 2438. The court distinguished *Archer*: "The Bureau . . . did not put 2438 West Division Street into interstate commerce; it was there all the time; they just induced Podolsky to direct his criminal intentions there." 798 F.2d at 180. Similarly, here the government persuaded the defendants to purchase goods which actually had been shipped in interstate commerce, rather than goods which had merely been shipped intrastate or which had not been shipped at all.

As noted by the court in *Podolsky*, federal courts have been extremely reluctant to set aside convictions on the sole basis of the principle announced in *Archer*. We agree with the Seventh Circuit that the decisions since *Archer* cast doubt "on the vitality of the independent principle announced there that forbids the 'manufacture' of federal

jurisdiction in circumstances not constituting entrapment and not canceling any element of the crime such as criminal intent." 798 F.2d at 177. Recognizing that cases may arise where governmental investigative conduct might be "so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction," *United States v. Russell*, 411 U.S. 423, 431-32, 93 S.Ct. 1637, 1643, 36 L.Ed.2d 366 (1973), we conclude that the government's conduct in this case does not approach such a level. The decision to involve federal, as opposed to state, resources was made within the bounds of political, rather than judicial, discretion. The government possesses broad discretion in determining whom to prosecute, subject to constitutional constraints prohibiting the exercise of such discretion based on race or other invidious grounds. *See Podolsky*, 798 F.2d at 181; *Wayte v. United States*, 470 U.S. 598, 105 S.Ct. 1524, 1530-31, 84 L.Ed.2d 547 (1985). Allegations of selective prosecution or other such unconstitutional conduct were not made by the appellants. Accordingly, federal jurisdiction was proper in this case.

C. *Should the trial court have granted a continuance after the government returned a superseding indictment?*

[7] Appellants contend that the trial court committed reversible error by refusing to grant a continuance when the government returned a superseding indictment two working days before trial was scheduled. Counsel for Fernandez did not receive the indictment until the day trial was scheduled to begin and the jury was selected. All of appellants' counsel requested that the court grant a continuance, preferably of at least two weeks, but a minimum of a day or two, in order to prepare for trial. The

court denied their request, and the trial began the next day.

Appellants argue that the flaw in the original indictment—its allegation that all of the overt acts allegedly committed in furtherance of the conspiracy took place after the alleged conspiracy had ended—was so great as to provide a complete defense to the offense charged. Because the government would have had to prove that an overt act occurred during the conspiracy, *United States v. Lichenstein*, 610 F.2d 1272, 1276 (5th Cir.), *cert. denied*, 447 U.S. 907, 100 S.Ct. 2991, 64 L.Ed.2d 856 (1980), appellants' initial defense relied on the fact that no overt acts could be shown to have taken place during the course of the conspiracy in the time frame alleged in the indictment. Appellants therefore argue that they were greatly prejudiced by the issuance of the superseding indictment, which corrected the dates of the alleged conspiracy.

The Supreme Court has established that the Speedy Trial Act of 1974, 18 U.S.C. §§ 3161 *et seq.*, as amended, does not require that a defendant be granted a 30 day minimum preparation period after a superseding indictment is filed. *United States v. Rojas-Contreras*, 474 U.S. 231, 106 S.Ct. 555, 88 L.Ed.2d 537 (1985). Nor must a defendant be compelled to go to trial less than 30 days after the filing of such an indictment; rather, "[t]he Act itself places broad discretion in the District Court to grant a continuance when necessary to allow further preparation." *Id.*, 106 S. Ct. at 558.[13] In this instance the

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13. This circuit had so held prior to the Supreme Court's decision in *Rojas-Contreras*. *See United States v. Hawkins*, 765 F.2d 1482, 1487 (11th Cir.1985) (district court must weigh the interests of a speedy trial with that of ensuring that defense counsel has a reasonable time to prepare; the court's decision is reversible only for an abuse of discretion), *cert. denied*, 474 U.S. 1103, 106 S.Ct. 886, 88 L.Ed.2d 921 (1986).

district court did not abuse its discretion in refusing to grant a continuance. The superseding indictment amended the original indictment in only two respects: (1) adding as an additional purpose of the conspiracy that appellants conspired to *receive* and *possess* stolen property, rather than merely to take the property unlawfully; and (2) changing the ending date of the conspiracy to the date of the appellants' arrest. Although the original indictment provided the correct dates for all of the overt acts alleged to have been committed in furtherance of the conspiracy, it charged that the conspiracy itself began and ended on the same day. Considering that the overt acts charged gave the defendants notice of the dates of their alleged misconduct, and that appellants have "not pointed to any important preparatory work which [their attorneys were] compelled to leave undone because of the change in the indictment," *United States v. Hawkins*, 765 F.2d 1482, 1488 (11th Cir.1985), *cert. denied*, 474 U.S. 1103, 106 S.Ct. 886, 88 L.Ed.2d 921 (1986), the district court did not abuse its discretion in denying a continuance.

D. *Did the admission of Pasqual's post-arrest statements violate Petit's right to cross-examine witnesses?*

Appellant Petit contends that the district court violated the Confrontation Clause, *see Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), by admitting into evidence his codefendant Pasqual's post-arrest statements without redacting their references to Petit. The Court in *Bruton* held that "a defendant is deprived of his Sixth Amendment right of confrontation when the facially incriminating confession of a nontestifying codefendant is introduced at their joint trial, even if the jury is instructed to consider the confession only against

the codefendant." *Richardson v. Marsh*, ... U.S. ....., 107 S.Ct. 1702, 1707, 95 L.Ed.2d 176 (1987).[14]

Petit's argument derives from the testimony of two witnesses at trial. The first, FBI agent Joseph Edgley, stated that defendant Pasqual told him that "the unloaders" of the equipment—men who had not participated in any of the discussions with the undercover agents—were new acquaintances of his, and that they were unaware that the equipment had been stolen.[15] A second FBI agent, Juanita Benavides, testified that Pasqual told

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14. It is only "where a nontestifying codefendant's confession incriminating the defendant *is not directly admissible against the defendant* . . . [that] the Confrontation Clause bars its admission at their joint trial. . . ." *Cruz v. New York*, ... U.S. ....., 107 S.Ct. 1714, 1719, 95 L.Ed.2d 162 (1987) (emphasis added). Under *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), an out-of-court statement is admissible against a defendant only if the statement's maker is unavailable as a witness and the statement bears a sufficient indicia of reliability. In *Lee v. Illinois*, 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986), the Court set forth the necessary degree of reliability required to admit a codefendant's confession implicating a defendant, where the defendant has also confessed. The Court held that "[i]f those portions of the codefendant's purportedly 'interlocking' statement which bear to any significant degree on the defendant's participation in the crime are not thoroughly substantiated by the defendant's own confession, the admission of the statement poses too serious a threat to the accuracy of the verdict to be countenanced by the Sixth Amendment." 106 S.Ct. at 2064-2065.

In this case, the district court assumed that the statements Pasqual made to the government agents were admissible only against Pasqual, so instructing the jury. The prosecution did not object and has not argued on appeal that Pasqual's statement met the reliability test of *Lee*. Additionally, neither Pasqual's nor Petit's post-arrest statements were taped or transcribed and reviewed by the appellants. Rather, their statements were admitted via the oral recollection, refreshed by references to notes, of the agents to whom the statements were made. Under these circumstances, at this stage of review we decline independently to undertake a *Lee* analysis.

15. The jury apparently understood Pasqual to refer to defendants Emerio Delgado and Jaime Lopez Villeda, who were acquitted at trial.

her that he had called a "friend," requesting to store some "stuff, television sets," at the friend's warehouse. From the evidence presented at trial, the jury was left with no other conclusion but that Petit was the "friend" who arranged for the storage of the goods. Petit argues that the inescapable conclusion from the combination of these statements was that he was not one of the "unloaders" who had been exculpated by Pasqual's statement. Accordingly, Petit contends that the clear inference from Pasqual's statements is that Petit participated in the conspiracy and *did know* that the goods were stolen.

Petit urges that the admission of Pasqual's confession through the testimony of agents Edgley and Benavides violated *Bruton* because the confession directly implicated Petit in the crime, and Petit had no opportunity to cross-examine Pasqual. We disagree that Pasqual's statements directly implicated Petit. The references to the "unloaders" and to the "friend" did not mention anyone by name, and no part of the confession actually referred to Petit by name. Moreover, before agents Edgley and Benavides were questioned about the statements that Pasqual had made to them, the judge instructed the jurors that they could consider the testimony only as to the defendant Pasqual. Therefore, rather than serving as "powerfully incriminating" evidence against Petit, Pasqual's statements "were not incriminating on [their] face, and became so only when linked with evidence introduced later at trial." *Richardson v. Marsh*, ... U.S. ....., 107 S.Ct. 1702, 1707, 95 L.Ed.2d 176 (1987).

[8] The Court in *Richardson* held that "the Confrontation Clause is not violated by the admission of a

nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, *but any reference to her existence.*" 107 S.Ct. at 1709 (emphasis supplied). The Court added in a footnote that it expressed no opinion as to the admissibility of a confession "in which the defendant's name has been replaced with a symbol or neutral pronoun." *Id.* at n. 5. In this case, Pasqual's statement that he called a "friend" who gave permission for the goods to be stored at his warehouse, when considered with the other evidence, could reasonably be understood only as referring to Petit. Accordingly, although Pasqual's confession did not directly implicate Petit in the conspiracy, it sufficiently inculpated him so as not to fall under the clear exception to *Bruton* provided by the Court's decision in *Richardson.*[16]

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16. If the only statement contested by Petit had been Pasqual's statement that the unloaders were unaware that the merchandise was stolen, he would not state a sufficient *Bruton* claim. In *United States v. Garrett*, 727 F.2d 1003 (11th Cir. 1984), *aff'd on other grounds*, 471 U.S. 773, 105 S.Ct. 2407, 85 L.Ed.2d 764 (1985), statements of a nontestifying codefendant, referring to "underlings" and "charges" in connection with his drug smuggling scheme, were admitted. This circuit rejected the defendant's claim that admission of these out-of-court statements violated his right to cross-examine witnesses, finding that "[t]hese isolated references to anonymous subordinates by no means directly implicated [the defendant]," also finding that the statements "did not provide the slightest hint as to [the other defendants'] particular identities." 727 F.2d at 1013-1014. Here, however, Pasqual's statement that he called "a friend" to arrange for storage of the "things," when considered with the other evidence, could only be understood as referring to Petit. Hence, we face a situation similar to that in *Serio v. United States*, 401 F.2d 989, 990 (D.C.Cir.1968) (per curiam), where Serio's name was deleted from his codefendant's confession and replaced with terms such as "another man," and similar to that described by the Supreme Court in footnote 5 of its opinion in *Richardson*, 107 S.Ct. at 1709.

[9] Even though the admission of Pasqual's confession referring to Petit violated *Bruton*, such violations are subject to the harmless error rule. *See Cruz v. New York*, ... U.S. ....., 107 S.Ct. 1714, 1719, 95 L.Ed.2d 162 (1987); *Harrington v. California*, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969); *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). As the Court stated in *Schneble v. Florida*, 405 U.S. 427, 430, 92 S.Ct. 1056, 1059, 31 L.Ed.2d 340 (1972), "[i]n some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the co-defendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error." Petit's own admissions may be considered in determining whether this confrontation clause violation was harmless. *Cruz*, 107 S.Ct. at 1719.

[10] On direct examination at trial, FBI agent Juanita Benavides testified that she interviewed Petit on July 28 after he waived his *Miranda*[17] rights. From memory, she stated that he told her that "he had received a telephone call some time that morning from this individual asking him if he could bring some stuff later on. He says probably television sets to his warehouse." According to Benavides, Petit stated that he had previously stored some business papers for this individual, and that he thought he probably would be paid for storing these items. Benavides also testified on direct that Petit told her he suspected that the goods might be stolen, but that he did not want to ask any questions of the individual for whom he was storing them.

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17. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

On cross examination, counsel for Petit asked Benavides to read from her notes of Petit's interview, which were written partly in Spanish and partly in English. Benavides translated her notes into English: "It did surprise them, this individual was bringing in TVs, but he did not bother to ask why." Additionally, Benavides admitted that her notes of the interview did not contain in either Spanish or English a statement by Petit that he suspected the television sets were stolen. Benavides further admitted that she was not surprised that there were factual inaccuracies between her testimony before the grand jury in seeking the indictment and the facts as elicited at trial, as she had been called at the last minute to testify before the grand jury as the case agent had to testify in another matter.

The other evidence against Petit came from the testimony of officer Devarone. He testified that after the first location for storing the goods proved to be unsuitable, Pasqual told him that he had already spoken to a person at a second location, where they were already in the process of moving out cars. According to Devarone, when the truckload of merchandise arrived at the warehouse, Pasqual asked Petit to move the two cars remaining in the warehouse. Devarone further testified that Petit was "a little upset because all the neighbors in the area were watching and he was afraid that they were going to call the police or something, because [the driver] was having a hard time parking the vehicle." Devarone stated that Petit said that it looked suspicious for them to be unloading televisions into an automobile repair warehouse, and that he wanted them to hurry up with the unloading. Devarone also testified that all five de-

fendants participated in the unloading, and that Petit stored some of the goods in the warehouse office. However, Metro-Dade Police Detective Hugo Gomez, who maintained surveillance over the delivery and unloading of the merchandise, testified that "the gentleman with the white hair," apparently referring to Fernandez, was "most upset" about the problems the driver had parking the truck. In contrast Gomez described Petit as "at the doorway just watching [the driver] and keeping an eye on the vehicles parked out there. Probably they were his customers." Gomez also testified that although he remembered seeing the other defendants, he could not recall whether or not Petit participated in unloading the electronic equipment.

In view of all of the testimony regarding Petit's participation in the conspiracy, applying a *Chapman*[18] harmless error analysis, we find that the admission of Pasqual's statements referring to Petit, albeit a *Bruton* violation, was harmless beyond a reasonable doubt. Although the totality of the evidence against Petit was less than that against the other appellants, given Petit's post-arrest admissions, his statements and behavior during the unloading of the truck as attested to by officer Devarone, and especially Devarone's properly admitted testimony corroborating the fact that Pasqual had called a person at a small warehouse to arrange for the storage of the goods, we conclude that the *Bruton* violation was harmless beyond a reasonable doubt.

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18. In *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967), the Court held that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."

E. *Was the evidence sufficient to support Petit's conviction?*

[11, 12] Petit has also argued that the evidence against him was insufficient to support his conviction.[19] Given our determination that the *Bruton* violation was harmless beyond a reasonable doubt, we must reject this contention. Challenges of insufficient evidence are reviewed under a less stringent standard than that used in harmless error analyses; whereas the *Chapman* test for finding a constitutional violation harmless requires proof "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained," *Chapman*, 386 U.S. at 24, 87 S.Ct. at 828, the test for weighing sufficiency of the evidence to support a conviction is whether based upon the evidence a reasonable trier of fact could find guilt beyond a reasonable doubt. In determining whether the evidence was sufficient to support a conviction, we must view " 'the evidence and all reasonable inferences flowing therefrom in the light most favorable to the Government,' " *United States v. Franklin*, 586 F.2d 560, 565 (5th Cir.1978), *cert. denied*, 440 U.S. 972, 99 S.Ct. 1536, 59 L.Ed.2d 789 (1979) (quoting *United States v. Cadillac Overall Supply Co.*, 568 F.2d 1078, 1084 (5th Cir.), *cert. denied*, 437 U.S. 903, 98 S.Ct. 3088, 57 L.Ed.2d 1133 (1978)), and " 'it is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilty, provided a reasonable trier of fact could find that the evidence establishes guilt

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19. Under *Burks v. United States*, 437 U.S. 1, 18, 98 S.Ct. 2141, 2150-51, 57 L.Ed.2d 1 (1978), "the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient. . . ."

beyond a reasonable doubt.'" *United States v. Vera*, 701 F.2d 1349, 1357 (11th Cir.1983) (quoting *United States v. Bell*, 678 F.2d 547, 549 (5th Cir. Unit B 1982) (en banc) (footnote omitted), *aff'd*, 462 U.S. 356, 103 S.Ct. 2398, 76 L.Ed.2d 638 (1983)). Given our conclusion that the *Bruton* violation was harmless beyond a reasonable doubt, we find that the properly admitted evidence provides a sufficient basis for the jury's decision to convict especially in light of the fact that it was unnecessary for the government to prove that Petit knew all of the details of the conspiracy, so long as it was proven that he knew the essentials of the conspiracy. *United States v. Alvarez*, 625 F.2d 1196, 1198 (5th Cir.1980), *cert. denied*, 451 U.S. 938, 101 S.Ct. 2107, 68 L.Ed.2d 324 (1981). Accordingly, we reject Petit's contention that the evidence was insufficient to support his conviction.

III.

For the foregoing reasons, we AFFIRM appellants' convictions.

113C 1 3C24 • PASQUAL, FRANCISCO 8 7 86-00643-JWK-1

STOLEN INTERSTATE SHIPMENT 5 86-3152-CHS

I CHARGES

US TITLE SECTION	OFFENSE CHARGED	ORIGINAL COUNTS	DISMISSING	COUNTS NO. D
18:371	Conspiracy w/intent to steal interstate & foreign shipment of freight shipment Ct. I	1		

II KEY DATE

6-7-86

III MAGISTRATE

	DATE	INITIAL NO
Search Warrant: Issued / Return		
Summons: Issued / Served		
Arrest Warrant Issued		
COMPLAINT ▶	7-29-86	CHS/3CAI

INITIAL APPEARANCE DATE ▶ 7-29-86 CHS/3CAI

PRELIMINARY EXAMINATION OR REMOVAL HEARING — Date Scheduled ▶ 8-8-86 — Date Held ▶ — WAIVED / NOT WAIVED — INTERVENING INDICTMENT

Tape Number: 86D- 134-1957

OUTCOME: HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT / DISMISSED / HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW

Date of Arrest	OFFENSE (in Complaint)
7-29-86	Possess of stolen goods from interstate shipment. 18 USC 371 & 659

(Show last names and suffix numbers of other defendants on same indictment, information or complaint)

RULE 20 21 40 Ind Out

ATTORNEYS (U.S. Attorney or Asst.)

BRUCE E. LOWE 12025/CAT.I/X

Defense 1 ☐ CJA 2 ☒ Ret 3 ☐ Waiver 4 ☐ Self 5 ☐ Nat Org 6 ☐ PD 7 ☐ CD

IV NAMES & ADDRESSES OF ATTORNEYS, SURETIES, ETC

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AMERICAN BANKERS INS CO
by George Cohen
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Miami FL 33125
324-8228

Deft's address
109 W 6th St # 5
Hialeah, FL 33010
887-8135

(Circle One)
Interpreter Required
No Interpreter
Not Known

SPANISH

BAIL • RELEASE

PRE INDICTMENT

Release Date
Be Denied
Fugitive
Pers Rec
PSA
AMOUNT SET $ 200,000
Conditions
Date Set 7-29-86
10% Dep
Surety Bnd
Bail Not Made
Collateral
Date Bond Made 7-31-86
3rd Prty
Other

POST INDICTMENT

Release Date
Be Denied
Fugitive
Pers Rec
AMOUNT SET $
PSA
Conditions
Date Set
10% Dep
Surety Bnd
Bail Not Made
Collateral
Date Bond Made
3rd Prty
Other

APPEALS FEE PAYMENTS

FINE AND RESTITUTION PAYMENTS

DATE	RECEIPT NUMBER	C.D. NUMBER

Docket Entries Begin On Reverse Side

DATE	RECEIPT NUMBER	C.D. NUMBER

A31

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I CHARGES

113C	1	3C24	FERNANDEZ, ROGER	8 7	86-00643-JWK
			STOLEN INTERSTATE SHIPMENTS	5	86-3152-CHS

US TITLE SECTION	OFFENSES CHARGED	ORIGINAL COUNTS	DISM'G	FELONY NOLO
18:371	Conspiracy w/intent to steal interstate & foreign shipment of freight shipment Ct. I	1		

II KEY DATE

XX

6

8-7-8

III MAGISTRATE

	DATE	INITIAL NO.
Search Warrant Issued		
Search Warrant Returned		
Summons Issued		
Summons Served		
Arrest Warrant Issued		
COMPLAINT ▶	7-29-86	CHS/3CAI

INITIAL APPEARANCE DATE ▶ 7-29-86 — INITIAL NO. CHS/3CAI

PRELIMINARY EXAMINATION OR REMOVAL HEARING — Date Scheduled ▶ 8-8-86 — Date Held ▶ — INITIAL NO. CHS/3CAI

☐ WAIVED ☐ NOT WAIVED — Tape Number 86D-134-1957

☐ INTERVENING INDICTMENT

OUTCOME
☐ DISMISSED
☐ HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT
☐ HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW

Date of Arrest	OFFENSE (In Complaint)
7-28-86	Possess of stolen goods from interstate shipments, 18 USC 371 & 659

Show last names and suffix numbers of other defendants on same indictment/information

RULE 20 ☐ 21 ☐ 40 ☐ In ☐ Out ☐

IV NAMES & ADDRESSES OF ATTORNEYS, SURETIES, ETC

ATTORNEYS
U S Attorney or Asst

BRUCE E. LOWE 12025/CAT. I/X

Defense 1 ☐ CJA 2 ☐ Ret 3 ☐ Waived 4 ☐ Self 5 ☐ Nor Other 6 ☐ PD 7 ☐ CO

PEDRO ECHARTE, Esq
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Miami FL 33125
324-8228

Deft's address
1010 E 10th Ave
Hialeah, FL
887-3440

(Circle One)
Interpreter Required
No Interpreter
Not Known

SPANISH
(Foreign Language)

BAIL & RELEASE

PRE INDICTMENT

Release Date
☐ Bail Denied
☐ Fugitive
☐ Pers Rec
☐ PSA
AMOUNT SET $ 5,000
Conditions
☐ 10% Dep
X Surety Bnd
☐ Collateral
☐ 3rd Party
☐ Other
Date Set 7-29-86
☐ Bail Not Made
Date Bond Made 7-29-86

POST INDICTMENT

Release Date
☐ Bail Denied
☐ Fugitive
☐ Pers Rec
☐ PSA
AMOUNT SET $
Conditions
☐ 10% Dep
☐ Surety Bnd
☐ Collateral
☐ 3rd Party
☐ Other
Date Set
☐ Bail Not Made
Date Bond Made

APPEALS FEE PAYMENTS

FINE AND RESTITUTION PAYMENTS

DATE	RECEIPT NUMBER	CD NUMBER	DATE	RECEIPT NUMBER	CD NUMBER

I Docket Entries Begin On Reverse Side

BEST AVAILABLE COPY

PD ☐ 113C 1 3C24 • PETIT, ANGEL 8 7 86-00643-JWK-

Misd ☐ ALIAS

Felony ☒ District Off Judge Mag. OFFENSE ON INDEX CARD: STOLEN INTERSTATE SHIPMENTS No of Defts 5 U.S. Mag. Case No. 86-3152-CHS

I CHARGES

US TITLE SECTION	OFFENSES CHARGED	ORIGINAL COUNTS	DISM'D	GUILTY NOLO
18:371	Conspiracy w/intent to steal interstate & foreign shipment of freight shipment Ct. I	1		

II KEY DATE

XX

EARLIEST OF	APPLICABLE	LATEST OF
▶	▶ 8-7-86	

Ist appear w/o waiver counsel | ARRAIGNMENT | Ist Trial Ended | Ind Trial Began | DISPOSITION DATE | SENTENCE DATE | PTD Note Prob | FINAL CHARGE DISMISSED or ST ground ☐ W.P. ☐ WOP | or def mot or on gov mot or

III MAGISTRATE

	DATE	INITIAL NO
Search Warrant Issued		
Search Warrant Return		
Summons Issued		
Summons Served		
Arrest Warrant Issued		
COMPLAINT ▶	7-29-86	CHS/3CAI

INITIAL APPEARANCE DATE ▶ 7-29-86 — INITIAL NO: CHS/3CAI

PRELIMINARY EXAMINATION OR REMOVAL HEARING — Date Scheduled ▶ 8-8-86 — Date Held ▶

☐ WAIVED ☐ NOT WAIVED — Tape Number

☐ INTERVENING INDICTMENT — 86D-134-1957

OUTCOME: ☐ DISMISSED ☐ HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT ☐ HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW

Date of Arrest: 7-28-86 — OFFENSE (In Complaint): Possess of stolen goods from interstate shipments, 18 USC 371 & 659

Show last names and suffix numbers of other defendants on same indictment/information

RULE 20 21 40 In Out

IV NAMES & ADDRESSES OF ATTORNEYS, SURETIES, ETC

ATTORNEYS
U.S. Attorney or Asst:
BRUCE E. LOWE 12025/CAT.I/X

Defense 1 ☒ CJA 2 ☐ Ret 3 ☐ Waived 4 ☐ Self 5 ☐ Non Other 6 ☐ PD 7 ☐ CD

ANA MARIA CARNESOLTAS, Esq
2600 Douglas Rd
Ste 806
Coral Gables, FL 33134
441-2750,

Deft's Address: 117 W. 6th St.
Hia. Fla. Apt. 12
558-2486

APPEARANCE BOND Set 8/15/86
AMT: $25,000CBS.

SURETY: GEORGE COLTEN
AMERICAN BANKERS INS. CO.,
1440 NW 13th Terr.
Miami, Fla. 33125
324-8228

(Circle One)
Interpreter Requested
No Interpreter Needed
Not Known

SPANISH
(Signature of Judge)

BAIL • RELEASE

PRE INDICTMENT

Release Date
☐ Bail Denied
AMOUNT SET $200,000
Date Set 7-29-86
☐ Bail Not Made
Date Bond Made
☐ Fugitive ☐ Pers Rec ☐ PSA
Conditions: ☐ 10% Dep ☒ Surety Bnd ☐ Collateral ☐ 3rd Prty ☐ Other

POST INDICTMENT

Release Date
☐ Bail Denied
AMOUNT SET $
Date Set
☐ Bail Not Made
Date Bond Made
☐ Fugitive ☐ Pers Rec ☐ PSA
Conditions: ☐ 10% Dep ☐ Surety Bnd ☐ Collateral ☐ 3rd Prty ☐ Other

APPEALS FEE PAYMENTS

FINE AND RESTITUTION PAYMENTS

DATE	RECEIPT NUMBER	CD NUMBER	DATE	RECEIPT NUMBER	CD NUMBER

☐ Docket Entries Begin On Reverse Side

BEST AVAILABLE COPY

PROCEEDINGS DOCKET FOR SINGLE DEFENDANT

V PROCEEDINGS PASQUEL

S.T.A.R.S

AUG 08 1986

7-29-86	a	COMPLAINT filed.	os
7-29-86	b	REPORT Commencing criminal action, DOB unknown-cuba.	os
7-29-86	c	ORDER (CHS) & advice to rr/c 8-1-86, prelim/arr set 8-8-86.	os
		BOND (no hrg held) bond set $200,000 CSB.	os
7-31-86	d	NOTICE of perm csl: Stephen Rosen, Esq.	jh
	e	ORDER ON BOND MOTION (CHS) stipulated bond. Bond reduced to $20,000.00 csb. Deft is to surr all travel documents to pt/svcs Report pt/svcs 3xwk phone.	jh
7-31-86	f	APPEARANCE bond posted $20,000.00 csb.	jh

BEGIN VOL.I

1986			
Aug 7	(1)	ALL DEFTS.: INDICTMENT Returned at Miami, FL.	rll
7	2	DELGADO: NOTICE of appear of Julio E. Jimenez,Esq as counsel.	dmt
12	(3)	PASQUAL: ARRAIGNMENT Info Csl Stephen H. Rosen, Bond Set $20,000CBS.	ag
12	4	VILLEDA:ARRAIGNMENT Info CSl appt FPD, Bond P/T detention, MCC.	
12	(5)	PETIT:ARRAIGNMENT info sht: MCC, Csl; Ana M. Carnesottas, Bond set $25,000CBSw/Nebbia.	
12	(6)	FERNANDEZ:ARRAIGNMENT info: Csl Pedro Ecjarte Bond set $5,000CBS.	
12	(7)	ALL DEFTS: S.D.O.	
12	8	DELGADO:ARRAIGNMENT info : csl Juilo E. Jimenez, Esq., Bond set $10,000.CSB.	
12	9	DELGADO: NOTIC of perm appearance of rec'd Juilo Jimeuez.	
12	(10)	FERNANEZ: NOTICE of perm appearance as csl Pedro Echarte.	
12	(11)	PASQUEL: ORDER (PJK 8/8/86) Deft'a M/to expand travel GRANTED. Deft permitted to travel to Panama, Costa Rica, Puerto Rico & Venezuela In order to Supp family BUsiness. (EOD 8/13/86).	
12	(12)	PASQUEL:MOTION to expand travel.	
22	13	VILLIDA: WAIVER (PJK 8/6/86) Deft advised of rights has refused & waived his right to challenge P/T detention Order.(EOD 8/26/86).	
22	14	VILLIDA:ORDER(PJK 8/6/86) of detention pending trial, Deft does not contest P/T detention in open court as he does not contest he is an illegal alien w/o ties in this country. (EOD 8/26/86).	
22	(22)	ALL DEFTS. ~~PASQUAL~~:GOVT'S resp to S.D.O.	
*12	(23)	ALL DEFTS: NOTICE of Jury trial 9/8/86 @9am.	
**15	(24)	PETIT:APPEARANCE BOND (PJK 8/15/86) amt $25,000CSB. 8/15/86.(EOD 8/26/86).	
**15	(25)	PETIT:ORDER(PJK 8/15/86) Nebbia Hrg Held & conditions satisfied. Deft be released upon posting of $25,000.00CBS. (EOD 8/26/86).	
4	(26)	ALL DEFTS: SUPERSEDING IND to change dates.	
5	(27)	FERNANDEZ:MOTION for disclosure of confidential informant & memo.	
5	(28)	FERNANDEZ:NOTIFICATION for interpreter.	
5	(29)	FERNANDEZ:MOTION for continuance.	
5	(30)	FERNANDEZ:MOTION for access to prospective Govt witnesses & memo.	
5	(31)	FERNANDEZ:MOTION for P/T James Hrg.	
5	(32)	FERNANDEZ:MOTION for Bill of particulars & memo.	
5	(33)	FERANADEZ:MOTION to Dism Ind & memo.	
5	(34)	FERANDEZ: MOTION for early disclosure of Jencks Act material & Memo.	
5	(35)	FERNADEZ: MOTION for redaction & memo.	
9	(36)	ALL DEFTS: MINUTES held 9/8/86 cont'd 9/10/86, @9am.	

V PROCEEDINGS FERNANDEZ

STARS
AUG 08 1986

7-29-86	a	COMPLAINT filed.	os	
7-29-86	b	REPORT commencing criminal action, dob 11-2-41.	os	
7-29-86	c	ORDER (CHS) & advice to deft, rr/c 8-1-86, prelim/arr set 8-8-86. BOND (yes bond hrg) ond set $5,000 CSB.	os	
7-29-86	d	NOTICE of temp app by Julio F. Jimenez, Esq.	os	
8-1-86	e	NOTICE re csl phone: Pedro Echarte, to file perm app		jh
7-29-86	f	APPEARANCE bond posted $5,000.00 csb.		jh

SEP 8	(37)	MINUTES Voir Dire begins 9/8/86, Cont'd 9/9/86.	
11	(38)	REQUESTeD special jury instruction. (FERNANDEZ). (REFUSED).	agd
*10	(39)	WRIT (JWK 9/10/86) H/C ad testificandum, Bring body of Yellador Gayas to testify 9/11/86. (EOD 9/16/86). ALL DEFTS.	agd
12	(40)	ALL DEFTS: MINUTES of jury trial ends 9/12/86.	agd
*11	(41)	~~ALL DEFTS~~ PASCUAL:GOVT'S proposed jury instructions.	agd
12	(42)	ALL DEFTS: COURT'S instructions to jury.	agd
12	(43)	PASQUAL:NOTICE of Sent date 10/28/86 @9am.	agd
12	(44)	FERNANDEZ:NOTICE of sentencing date 10/28/86 @9am.	agd
12	(45)	PETIT:NOTICE sentenceing date 10?28/86 @9am.	agd
12	(46)	PASQUAL:VERDICT Guilty ct. 1.	agd
12	(47)	FERNANDEZ:VERDICT of Guilty Ct. 1 .	agd
12	(48)	PETIT:VERDICT Guilty ct 1..	agd
12	49	VILLEDA:VERDICT as to ct. N/Guilty.	agd
12	50	DELGADO:VERDICT N/G ct 1.	agd
**11	(51)	ALL DEFTS: MINUTES of jury trial 9/11/86 cont'd 9/12/86.	agd
*12	52	NOTICE of Arr on superseding 9/17/86 @10am.(VILLEDA)	agd
**12	53	DELGADO:NOTICE of Arr on superseding ind 9/17/86 @10am.	agd
**12	(54)	FERNANDEZ:NOTICE of Arr on superseding ind @10am.	agd
**12	(55)	PETIT: NOTICE Arr on superseding Ind 9/17/86 @10am.	agd
**12	(56)	PASQUAL:NOTICE of Arr on Supereding Ind @10am 9/17/86.	agd
***10	(57)	ALL DEFTS:MINUTES of jury trial 9/10/86 cont'd 9/11/86.	agd
15	(58)	PASCUAL:RETURNED Writ of H/C exec 9/9/86.	agd
16	59	DELGADO:JUDGMENT(JWK 9/12/86) of Acquittal as to Ct 1 of Ind. (EOD 9/19/86).	agd
17	60	VILLEDA:JUDGEMENT of Acquittal(JWK 9/12/86) as to Ct 1 of Ind. (EOD 9/19/86).	agd
**16	61	ALL DEFTS. ~~PASQUAL~~:NOTICE of exhibit location w/court file.	agd
17	62	VILLEDA:JUDGMENT of Acquittal(JWK 9/12/86) ct 1 of Ind., (EOD 9/19/86).	agd
NOV 7	(63)	R. FERNANDEZ:NOTICE OF APPEAL from J&C entered on 11/7/86. (Copies to USCA, Pedro P.Echarte, JR., Esq., AUSA, US Marshal, US Probation,Ct. Reporter Coord.) (FEE PAID).	njf
OCT 31	64	GAYOSO:ORDER(JWK 10/31/86) M/for release pending Appeal DENIED. (EOD 11/12/86CCAP).	agd
NOV 7	(65)	PETIT:J&C(JWK 11/7/86) Impr 2yrs. Split-Sent, Confined to community treatment center for (6)mons, remainder suspended upon dischrg from incarceration., Deft place on Porb (3)yrs. Assessed $50.00 . Vol surr noon 12/8/86. (EOD 11/12/86CCAP-M).	agd
7	(66)	FERNANDEZ:J&C (JWK 11/7/86) (2)yrs. Impr. Deft assessed $50.00 Vol surr 12/8/86. Incarcerated Eglin, Fla. (EOD 11/12/86CCAP-M).	agd
14	(67)	PETIT: NOTICE OF APPEAL from J&C entered 11/7/86. (Copies to USCA, Ana-Maria Carnesoltas, P.A. Jeffery B. Crockett, AUSA, Steven Rosen, Esq. Pedro Echarte, Esq. US Marshal, US Probation, Ct. Reporter Coord).(NO FEE PAI	njf

CONTINUED TO PAGE

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V. PROCEEDINGS PETIT

STARS

7-29-86	a	COMPLAINT filed.	os
7-29-86	b	REPORT commencing criminal action, DOB 5-6-45.	os AUG 0 8 1986
7-29-86	c	ORDER (CHS) & advice to deft, CJA appt of Maria Carnesoltas, Esq. prelim/arr 8-8-86. BOND (no hrg held) bond set $200,000 CSB.	os
	d	CJA 20 ORDER (CHS) apptg A M Carnesoltas as csl no 955466	jh
8/5/86	e	ORDER (PJK-86B-141-126) GRANTING deft's motion to reduce bond. Bond is set at $25,000 CSB/NEBBIA	pm

1986 NV 21	(68)	PASOCAL:J&C(JWK 11/18/86) Impr 2 yrs. Assessed $50.00. Vol surr to institute w/alcohilic rehab program & strongly recomm incarceration Lexington, Ky. (EOD 11/24/86M). agd
21	(69)	PASQUAL F.: NOTICE OF APPEAL from the Judg/Convict (J&C) entered 11/21/86 (COPIES to USCA, Stephen G. Rosen,Esq. U.S.Marshal , US Probation, Crt. Rep. Coord) (NO FEE PAID)
DEC 3	--	PETT&FERNANDEZ:CERTIED copies of NOA to USCA, no fees paid. (case # USCA 86-5945).
5	--	PASQUAL:CERTIFIED copy of NOA to USCA, case #86-5960, No fees pd. agd
16	--	CLERK'S Recpt. #34944 in sum of $70.00 for pmt. of NOA by Stephen Rosen, Esq. (FOR F. PASQUAL) #86-5960 nj
31	(70)	PETIT:CJA 21(JWK 11/24/86) auth paym't to Ana M. Carnesoltas, Esq., for all proceedings in amt Of $2,000 (EOD 1/5/87) Voucher # 955466 agd

NO FURTHER DOCKETING ON THIS SHEET

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UNITED STATES DISTRICT ... FL
CRIMINAL DOCKET U.S. vs

PASQUAL, FRANCISO et al.,

86-0643-JWK-5
Yr | Docket No | Def.

DATE 1987	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DELAY (a)	(b)	(c)	(d)
FEB 11	(71) FERNANDEZ: MOTION for leave to travel abroad.		agd		
11	72 ALL DEFTS: TRANSCRIPT of tria; 9/9/86 vol I, Pgs. 1-208.		agd VOL. 2		
11	73 ALL DEFTS: TRANCRIPT of APPEAL -Vol II, pgs. 1-209.		agd VOL. 3		
19	(74) FERNANDEZ: GOVT"s opposition to motn to travel.		dmt END VOL. I		

Certified to be a true and correct copy of the original.
Robert M. March, Clerk
U.S. District Court
Southern District of Florida
By Cecile Ackerson
Deputy Clerk
Date February 24, 1987

Interval (per Section II) | Start Date / End Date | Ltr. Code | Total Days

A37

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[1-1]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

NO. 86-643-Cr-JWK

UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRANCISCO PASQUAL, ROGER FERNANDEZ, ANGEL PETIT, EMERIO DELGADO, JAIME LOPEZ VILLEDA,
Defendants.

Miami, Florida, September 9, 1986, 9:30 a.m.
VOLUME 1

EXCERPTS FROM TRANSCRIPT OF TRIAL

BEFORE THE HONORABLE JAMES W. KEHOE
AND A JURY

APPEARANCES:

For the Government:
JEFFREY CROCKETT, ESQ.
Assistant U. S. Attorney

For Defendant Pasqual:
STEPHEN ROSEN, ESQ.

For Defendant Fernandez:
PEDRO ECHARTE, ESQ.

For Defendant Petit:
ANA N. CARNESOLTAS, ESQ.

For Defendant Delgado:

JULIO JIMINEZ, ESQ.

For Defendant Villeda:

JOHN BERGENDAHL, ESQ.

Court Reporter:

PAUL HAFERLING

301 North Miami Avenue

Miami, Florida 33128

* * *

[1-52] BY MR. CROCKETT:

Q. Sir, please give an answer as to the value of a—

A. Between 200,000 and 500,000.

Q. How full was this particular truck at the time when it arrived at Miami, including the 442 items that were removed at the warehouse?

A. About three-quarters full.

MR. CROCKETT: I have no further questions. I may recall him later on.

MR. ROSEN: No questions.

CROSS EXAMINATION

BY MR. ECHARTE:

Q. Essentially, it is your testimony that you loaned this truck to the F.B.I.?

A. Yes.

Q. The loaning of the truck to the F.B.I. has nothing to do with the transportation of those goods from their source to where they are to be delivered?

A. The truck was en route at the time I loaned it.

Q. I understand, but in order for the truck to arrive at its destination, it was not necessary to loan it to the F.B.I.?

A. No, it was not.

Q. While this truck was in the F.B.I.'s possession, it was not in the process of transporting goods, it was in the process of a sting operation; correct?

[1-53] A. I guess so, yes.

MR. ECHARTE: Thank you. I have nothing further.

MS. CARNESOLTAS: No questions.

MR. JIMINEZ: No questions.

THE COURT: Mr. Bergendahl.

MR. BERGENDAHL: No questions.

THE COURT: Thank you. You may step down.

(Witness excused.)

CARLOS DEVARONE, GOVERNMENT WITNESS, SWORN.

THE COURT: State your full name and spell your last name.

THE WITNESS: Carlos Devarone, D-e-v-a-r-o-n-e.

DIRECT EXAMINATION

BY MR. CROCKETT:

Q. Sir, please tell us how you are employed.

A. I work as a detective for the City of Hialeah Police Department.

Q. How long have you been had that position?

A. I have been there for three years eight months with the Detective Bureau.

Q. Please tell the jury something about your duties in that position?

A. I am a burglary detective. I work crimes against property, any type of burglary I handle.

Q. This particular operation that we are discussing was an * * *.

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

File No. 86-643-CR-JWK

UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRANCISCO PASQUAL, ROGER FERNANDEZ, ANGEL PETIT, EMERIO DELGADO, JAIME LOPEZ VILLEDA,
Defendants.

Miami, Florida
September 10, 1986

APPEAL

VOLUME II

BEFORE THE HONORABLE JAMES W. KEHOE

APPEARANCES:

For the Government:

JEFFREY CROCKETT, Assistant
United States Attorney

For Defendant Pasqual:

STEPHEN ROSEN, ESQ.

For Defendant Fernandez:

PEDRO ECHARTE, ESQ.

For Defendant Petit:

ANA N. CARNESOLTAS. ESQ.

For Defendant Delgado:

JULIO JIMINEZ, ESQ.

For Defendant Villeda:

JOHN BERGENDAHL, ESQ.

Reporter:

PAUL HAFERLING,
301 North Miami Avenue
Miami, Florida 33128

* * *

[122] Daugherty - cross

* * * transportations of interstate commerce?

A. We do not get involved in the regulations.

Q. Have you ever been involved in this situation where a vehicle that you had leased to in this case, and we can use the example of NAPP Electronics being taken out of the interstate commerce and used for some other purpose and then restored it to interstate commerce.

A. Not to my knowledge.

Q. Has your firm ever worked with the Federal Bureau of Investigation in the controlling of thefts in interstate commerce?

A. I have not personally, no.

Q. How about your company?

A. I have no idea.

MR. ROSEN: I have nothing further.

CROSS-EXAMINATION

BY MR. ECHARTE:

Q. By looking at the bill of lading you can tell each and every stop that the shipment was to make. Is that correct?

A. That is correct.

Q. Were any of the stops that this shipment was to make in Opa Locka?

A. Not according to this document, no.

Q. Were any of the stops that this shipment was to make in Hialeah?

[123] A. Not according to this document.

Q. Were any of the stops that this shipment was to make, the FBI?

A. Not according to this document.

Q. In order for this shiment to reach its ultimate destination, was it necessary that it go through the hands of the FBI?

A. Not according to this document.

Q. Have you ever had shipment, as far as you know, since you have been employed with North American Van Lines?

Have you ever had a shipment where it was necessary that the shipment go through the hands of the FBI in order to reach its final destination?

A. Not to my knowledge, no.

Q. You indicated that this document was kept in the regular course of business of North American Van Lines?

A. That is correct.

Q. Before today had you ever seen that particular document before?

A. It is on file for this shipment at North American Van Lines.

Q. Did you look to be certain that it was on file?

A. Yes, I did.

Q. You also testified earlier that this document was prepared in the regular course of NAPP Consumer Electronics business?

* * *